BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MERLYN BAHR	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,704
MODINE MANUFACTURING COMPANY	)	
Respondent	)	
AND	)	
	)	
SENTRY INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent, insurance carrier and the Workers Compensation Fund request review of the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 21, 1995. The Appeals Board heard oral argument in Kansas City, Kansas, on July 17, 1995.

APPEARANCES

Claimant appeared in person and by her attorney, Gary L. Jordan of Ottawa, Kansas. The respondent and its insurance carrier appeared by their attorney, H. Wayne Powers of Overland Park, Kansas. The Workers Compensation Fund appeared by its attorney, Diane W. Simpson of Lawrence, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a sixty-eight percent (68%) work disability. The respondent, insurance carrier and Workers Compensation Fund requested the Appeals Board review the finding of nature and extent of disability. That is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be modified. Claimant is entitled permanent partial general disability benefits based upon an eighty percent (80%) work disability.

Claimant injured her hands and shoulders while working for the respondent as a welder during the period of September 9, 1992 to May 11, 1993. Before this period, claimant sustained work-related injuries to her hands and arms from repetitive mini-trauma. Claimant filed a workers compensation claim for that earlier injury and settled the case based upon functional impairment. Claimant alleged the earlier injury occurred over a period of time and culminated on September 9, 1992. Despite these injuries, claimant continued to work for the respondent through May 11, 1993. Between September 1992 and May 1993, claimant was initially able to perform her job but was ultimately given work outside her medical restrictions, which caused additional injury to her upper extremities and a new injury to her shoulders. The subject matter of this proceeding is that subsequent injury. As a result of her subsequent injury and increased symptomatology, claimant resigned her employment with respondent on May 11, 1993.

Orthopedic surgeon John J. Wertzberger, M.D., examined claimant both on November 22, 1992 and July 12, 1993. The first visit was conducted to evaluate the extent of claimant's impairment from the earlier injury. The second visit was conducted to evaluate the extent of claimant's impairment from the subsequent injury. Dr. Wertzberger testified claimant's whole body functional impairment increased between the two dates of visits from twenty-nine percent (29%) to thirty-two percent (32%). On the first visit he found and diagnosed bilateral tenosynovitis, whereas, on the second visit he found bilateral shoulder injuries that he diagnosed as scapulocostal syndrome. After his initial evaluation of claimant in November 1992, the only restriction he placed upon her was to limit her to light work. However, as a result of the bilateral shoulder injury, Dr. Wertzberger modified and increased claimant's restrictions and limited her to sedentary work and restricted her from using her arms beyond sixty degrees (60°) abduction and flexion. He does not believe claimant should be working as a production worker for respondent. He also believes claimant should be restricted from tight gripping and repetitive twisting and gripping.

Plastic and reconstructive surgeon John B. Moore IV, M.D., examined claimant both on February 5, 1993 and December 28, 1993. Dr. Moore considers himself a hand surgeon and rarely treats shoulders and backs. The February 1993 examination was conducted to evaluate claimant's impairment from the earlier injury. Dr. Moore believes

claimant's functional impairment to her hands and arms increased after February 1993 from fifteen percent (15%) to twenty-two percent (22%). Because he does not rate shoulders, necks and backs, he did not include a rating for trigger areas in claimant's trapezius.

Board-certified orthopedic surgeon E. Bruce Toby, M.D., testified on behalf of the respondent. He examined claimant on February 23, 1994 and diagnosed myofascial pain syndrome, or fibromyalgia. He did not rate claimant and placed no restrictions on claimant except overhead lifting.

The parties presented the testimony of two vocational rehabilitation experts, Michael J. Dreiling and Gary Gammon. Mr. Dreiling testified that based upon her age, claimant was able to work in the sedentary through medium labor categories before either of her injuries. Because of the subsequent injuries to her upper extremities and shoulders, claimant is now limited to sedentary work only, which results in a ninety-two percent (92%) loss of access to the open labor market utilizing the restrictions of Dr. Wertzberger. He also believes claimant retains the ability to earn $4.25 per hour which results in a sixty-seven percent (67%) loss of ability to earn a comparable wage. On the other hand, Mr. Gammon initially testified that claimant did not experience any loss of ability to perform work in the open labor market as a result of the subsequent injuries and, therefore, likewise experienced no loss of ability to earn a comparable wage. However, on cross examination, Mr. Gammon conceded that claimant did sustain some loss of ability to perform work in the open labor market as a result of her latest injuries but he did not quantify the extent.

After considering the whole record, the Appeals Board finds the opinions of Dr. Wertzberger and those of Michael J. Dreiling the most persuasive. Therefore, the Appeals Board finds the claimant has lost ninety-two percent (92%) of her ability to perform work in the open labor market and sixty-seven percent (67%) of her ability to earn a comparable wage. When Mr. Dreiling analyzed claimant's losses, he determined that claimant lost forty-two percent (42%) of her ability to perform work in the open labor market as a result of the hand and arm injuries over which she settled for functional impairment. He then determined claimant lost an additional fifty percent (50%) of her ability to perform work in the open labor market because of the increased injury to the upper extremities and the shoulders. We believe this is an acceptable manner to analyze work disability as required by K.S.A. 1992 Supp. 44-510e when a claim for an earlier injury has been settled for functional impairment because claimant returned to work, after recovering from that earlier injury, at a comparable wage, thus, creating the presumption of no work disability. However, we also find that there is a reduction in compensation as provided by K.S.A. 44-510a because there is one hundred percent (100%) contribution from the earlier disability to the ultimate work disability resulting from the later accident.

Because she has sustained a “non-scheduled injury,” claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. The statute provides in pertinent part:

> “The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage

> of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The presumption of no work disability contained in the above statute does not apply. Since her latest injury, claimant has not returned to work for any employer at a comparable wage. Respondent argues the presumption should apply because the company has offered claimant accommodated employment. Respondent contends this issue is controlled by Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The Appeals Board disagrees. Based on claimant's testimony, along with that of Dr. Wertzberger, the Appeals Board finds claimant was justified in rejecting the job offer of respondent. After her first injuries, claimant returned to work for respondent to perform accommodated work. However, respondent placed claimant in work outside her medical restrictions and limitations which ultimately resulted in the injury now before us. The respondent delayed for more than a year to offer an accommodated position to claimant after she had terminated her employment with respondent in May 1993. The proposed job appears to be a makeshift combination of duties borrowed from at least two other jobs and would place claimant on the graveyard shift. Based upon his understanding of the offered job, Dr. Wertzberger does not believe claimant is physically capable of sorting connector hoses or inspecting radiator cores because he believes both jobs would require claimant to use her hands in front of her in a sustained fashion, which she should not do. In light of Dr. Wertzberger's testimony and claimant's present complaints, it is questionable whether claimant should even attempt to perform the offered job. Based upon all the evidence, the Appeals Board finds claimant did not unreasonably refuse to attempt to return to work for the respondent. Therefore, Foulk v. Colonial Terrace, *supra*, does not apply.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case, there appears no compelling reason to give either factor greater weight and, accordingly, they will be weighed equally. The result is an average between the ninety-two percent (92%) loss of ability to perform work in the open labor market and the sixty-seven percent (67%) loss of ability to earn a comparable wage resulting in an eighty percent (80%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

Pursuant to K.S.A 44-510a, the respondent, its insurance carrier and the Workers Compensation Fund are entitled to a reduction for the permanent partial disability compensation paid claimant for the earlier injury culminating September 9, 1992 which was docketed under number 170,611. Because of the manner we analyzed claimant's work disability, claimant's earlier bilateral upper extremity injury is wholly incorporated in claimant's work disability. Therefore, to avoid a duplication or pyramiding of benefits, there is a reduction of compensation to the extent of one hundred percent (100%) of the weekly permanent partial disability rate that was payable in the earlier proceeding. As provided by K.S.A. 44-510a, the reduction is appropriate during any overlapping period of permanent partial disability benefits paid or payable in this claim and her earlier claim.

In her earlier settlement, claimant was paid the sum of $37,807.33 as compensation for the 415 week period beginning September 9, 1992. Therefore, claimant's weekly compensation rate for the earlier injury would be $91.10 and would have been paid through August 23, 2000. Because the Appeals Board finds a one hundred percent (100%) contribution between the earlier disability and the ultimate disability found in this proceeding, the respondent, insurance carrier and Workers Compensation Fund are entitled a reduction of $91.10 per week for the overlapping periods of permanent partial disability benefits. The weekly permanent partial general disability rate for an eighty percent (80%) work disability based upon an average weekly wage of $514.49 per week is $274.41 per week. After crediting $91.10 per week, the reduced permanent partial disability rate for the period of overlap is $183.31.

The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge that are not inconsistent with those specifically set forth above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on March 21, 1995, should be, and hereby is, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Merlyn J. Bahr and against the respondent, Modine Manufacturing Company, and the insurance carrier, Sentry Insurance Company, and the Workers Compensation Fund for an accidental injury which occurred on May 11, 1993, and based on an average weekly wage of $514.49, for 380.14 weeks of compensation at the reduced rate of $183.31 per week in the sum of $69,683.46, and 34.86 weeks of compensation at the unreduced rate of $274.41 per week in the sum of $9,565.93 for an 80% permanent partial general body disability making a total award of $79,249.39.

As of October 6, 1995, there is due and owing claimant 125.43 weeks of permanent partial disability compensation at the reduced rate of $183.31 per week or $22,992.57, which is ordered paid in one lump sum less any amounts previously paid.

The remaining balance of $56,256.82 is to be paid for 254.71 weeks of permanent partial disability compensation at the reduced rate $183.31 per week or $46,690.89, followed by 34.86 weeks of permanent partial disability compensation at the rate of $274.41 per week or $9,565.93 until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application and approval of the Director. Unauthorized medical expense of up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

All compensation, medical expenses and administrative costs are to be borne 25% by the respondent and 75% by the Workers Compensation Fund.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 25% to the respondent and 75% to the Workers Compensation Fund to be paid directly as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of Regular Hearing	$216.70
Hostetler & Associates	
Deposition of John J. Wertzberger, M.D.	$596.80
Deposition of Michael Dreiling	$381.25
Deposition of E. Bruce Toby, M.D.	$402.40
Deposition of John B. Moore, IV, M.D.	$172.75
Deposition of Dick Santner	$317.50
Deposition of Gary Gammon	$299.80
Deposition of Mark Lamont Voss	$226.60
Owens, Brake & Associates	
Deposition of Jerry Retallick	$102.70
Deposition of Neil O'Connor	$221.05
Deposition of David Ales	$164.20

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, Kansas
H. Wayne Powers, Overland Park, Kansas
Diane W. Simpson, Lawrence, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director